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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 RAYMOND G. PAGE,

11 Plaintiff,

12 v.

13 JEFFERSON TRANSIT AUTHORITY,
14 DAVID A. TURISSINI, AND EILEEN M.
15 LAWRENCE,

16 Defendants.

Case No. C08-5456RJB

ORDER ON JTA DEFENDANTS'
MOTION FOR COSTS AND
NECESSARY DISBURSEMENTS AND
MOTION FOR ATTORNEYS' FEES

17 This matter comes before the Court on Jefferson Transit Authority and David A. Turissini's ("JTA
18 Defendants") Motion for Costs and Necessary Disbursements (Dkt. 120) and Motion for Attorneys' Fees
19 (Dkt. 125). The Court has considered the pleadings filed in support of and in opposition to the motions,
20 and the remainder of the file herein.

21 **I. FACTS**

22 On July 21, 2008, Plaintiff, *pro se*, filed a Complaint, alleging that he is a disabled person, and that
23 Defendants discriminated against him based on his mental disability, retaliated against him for exercising his
24 rights, violated his free speech and due process rights, and conspired to interfere with his civil rights. Dkt.
25 1. He cites the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 1983, 1985 and 1988. *Id.*

26 Plaintiff was employed by Defendant Jefferson Transit Authority ("JTA") as a driver. Dkt. 1, at 2;
27 Dkt. 83, at 6. JTA provides public transportation services in Jefferson County, Washington. Dkt. 1, at 2.

28 Private attorney and Defendant in this case, Eileen M. Lawrence, was retained by JTA to respond

1 to Plaintiff's work break violation grievances and charges of discrimination filed with the EEOC. Dkt. 47,
2 at 1. Ms. Lawrence's Motion for Summary Judgment was granted, and Plaintiff's claims against her were
3 found to be "unreasonable, frivolous, meritless and vexatious." Dkt. 84 (*citing Vernon v. City of Los*
4 *Angeles*, 27 F.3d 1385, 1402 (9th Cir. 1994)). Ms. Lawrence was awarded costs and attorneys' fees. Dkt.
5 110.

6 On July 15, 2009, the JTA Defendants' Motion for Summary Judgment was granted, and Plaintiff's
7 remaining claims were dismissed. Dkt. 116. The facts and procedural history regarding the claims against
8 the JTA Defendants are contained in the Court's July 15, 2009, Order Granting Jefferson Transit Authority
9 and David A. Turissini's Motion for Summary Judgment (Dkt. 116, at 1-6) and are adopted here by
10 reference.

11 The JTA Defendants now seek an award of attorneys' fees arguing that Plaintiff's claims against
12 David A. Turissini and his non-ADA claims against Jefferson Transit Authority merit an award of
13 attorneys' fees because Plaintiff knew that they had no merit based upon the Court's prior orders and case
14 law given him by Defendants' counsel. Dkt. 125. JTA Defendants seek \$15,305.00 in attorneys' fees. *Id.*
15 They seek costs in the amount of \$1,874.53. Dkt. 120. Plaintiff opposes an award of fees and costs. Dkt.
16 129.

17 **II. DISCUSSION**

18 **A. ATTORNEYS' FEES**

19 Section 1988 of the Civil Rights Act, provides that a prevailing defendant should not routinely be
20 awarded attorneys' fees and costs simply because he has succeeded, but rather only where "the action is
21 found to be unreasonable, frivolous, meritless, or vexatious." *Christiansburg Garment Co. v. Equal*
22 *Employment Opportunity Commission*, 434 U.S. 412, 421 (1978); *Vernon v. City of Los Angeles*, 27 F.3d
23 1385, 1402 (9th Cir. 1994)(*internal citations omitted*). An action is considered frivolous in the Ninth
24 Circuit when the result is obvious or the Plaintiff's arguments are wholly without merit. *Id.* This standard
25 is applied with particular strictness where a plaintiff proceeds *pro se*. *Miller v. Los Angeles Board of*
26 *Education*, 827 F.2d 617 (9th Cir. 1997). The Ninth Circuit held in *Miller* that a district court should
27 consider a Plaintiff's *pro se* status and ability to pay an award of fees to a prevailing defendant in civil
28 rights suits. *Id.*, at 620.

1 Similarly, the ADA's attorneys' fees provision allows the court to award a prevailing private party
2 "a reasonable attorney's fee, including litigation expenses, and costs." 42 U.S.C. § 12205. "Attorney's fees
3 under § 12205 should be awarded to a prevailing defendant only if the plaintiff's action was frivolous,
4 unreasonable, or without foundation." *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1190 (9th Cir.
5 2001)(citing *Christiansburg*, at 421). Because § 12205 makes fees and costs parallel, the *Christiansburg*
6 test, used in fee awards under § 1988, also applies to an award of costs to a prevailing defendant under the
7 ADA. *Id.*

8 1. Whether Action is Unreasonable, Frivolous, Meritless or Vexatious

9 Based upon the record as a whole, it cannot be said that Plaintiff's action against the JTA
10 Defendants was "unreasonable, frivolous, meritless, or vexatious." *Christiansburg*, at 421. The fact that
11 Plaintiff's choose to abandon some claims at the summary judgment stage does not render the entire action
12 frivolous. Plaintiff's ADA claims regarding his mental disability were not wholly without merit. His claims
13 were dismissed because he did not carry his burden to defeat a summary judgment motion. Dkt. 116. The
14 JTA Defendants should not be given an award of attorneys' fees or costs based upon this factor.

15 2. Pro Se Status

16 In *Miller*, the Ninth Circuit noted that "*pro se* plaintiffs cannot simply be assumed to have the same
17 ability as a plaintiff represented by counsel to recognize the objective merit (or lack of merit) of a claim."
18 *Id.*, at 620. The Ninth Circuit provides some factors to be taken into account in determining whether a *pro*
19 *se* plaintiff should know, or does know, that a claim is groundless. *Id.*

20 First, it warns that a district court should be wary of awarding fees in a civil rights case that it is
21 unable to conclude should be dismissed before trial. *Id.* This factor favors an award of fees to the JTA
22 Defendants. Like the claims against Ms. Lawrence, Plaintiff's claims against JTA were dismissed by
23 motion well before trial.

24 Second, the *Miller* Court noted that "repeated attempts by a *pro se* plaintiff to bring a claim
25 previously found to be frivolous militates in favor of awarding attorney's fees to a prevailing defendant."
26 *Miller*, at 620. This factor is not particularly helpful here. The JTA Defendants point out that Ms.
27 Lawrence was awarded costs and fees, so Plaintiff should have known that his claims against them were
28 without merit. Dkt. 125. As the record shows, the JTA Defendants were not in the same position vis a vis

1 the Plaintiff as Ms. Lawrence, JTA's private attorney. Moreover, the fact that the EEOC choose not to
2 prosecute Plaintiff's claim is not necessarily an indication that the case has no merit.

3 Lastly, the Ninth Circuit states that claims brought in bad faith support an award of fees. *Miller*, at
4 620. There is insufficient evidence in the record to find that Plaintiff acted in bad faith here. This factor
5 does not favor an award of fees.

6 3. Financial Ruin

7 "[A] district court in cases involving 42 U.S.C. §§ 1981, 1983 or Title VII should consider the
8 financial resources of the plaintiff in awarding fees to a prevailing defendant." *Miller*, at 621 (*internal*
9 *citations omitted*). This is particularly true when the fee request against an individual plaintiff is sizable.
10 *Id.* "While an award of attorney's fees for a frivolous lawsuit may be necessary to fulfill the deterrent
11 purposes of 42 U.S.C. § 1988 and 42 U.S.C. § 2000e-5(k), the award should not subject the plaintiff to
12 financial ruin." *Id.*

13 Plaintiff states that his prior pleading, filed in response to the Order to Show Cause regarding an
14 award of fees to Ms. Lawrence (Dkt. 104-2, at 2), is still accurate as to his financial resources. Dkt. 130.
15 The pleading indicates that he is not employed. Dkt. 104-2, at 2. He states that he earns \$1,437.00 a
16 month from Social Security, and \$149.00 a month from Boeing, for a total monthly income of \$1,586.00.
17 *Id.* He reports the following assets: 1986 Subaru Brat, valued at \$1,000.00, and a 1979 Watkins 27
18 sailboat, valued at \$7,500.00. *Id.* Plaintiff reports that he has no cash in a savings or checking account.
19 *Id.* Plaintiff reports that he pays \$575.00 monthly in boat moorage fees, wireless communication fees, and
20 insurance, leaving him \$1,011.00 per month. *Id.* Plaintiff does not provide any information regarding his
21 living expenses such as food, gas, medicine, clothing, utilities, if any, etc. Plaintiff adds in his declaration in
22 opposition to the JTA Defendants' motion, that his financial condition is worsened by the \$5,000 award of
23 fees and costs made to Ms. Lawrence in this case. Dkt. 130. It appears from the record that Plaintiff
24 would be unable to pay a further award in this case without being "subjected to financial ruin." *Miller*, at
25 621.

26 4. Conclusion

27 Upon consideration of the record, Plaintiff's *pro se* status, and his ability to pay, an award of
28 attorneys fees and costs should not be granted.

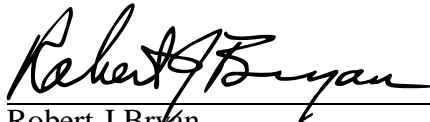
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III. ORDER

Therefore, it is hereby, **ORDERED** that:

- Jefferson Transit Authority and David A. Turissini's ("JTA Defendants") Motion for Costs and Necessary Disbursements (Dkt. 120) and Motion for Attorneys' Fees (Dkt. 125) is **DENIED**; and
- The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

DATED this 8th day of September, 2009.


Robert J Bryan
United States District Judge